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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-613

MRS. DELTA MELANCON,
Petitioner,

versus

RMK-BRJ, A Joint Venture,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

A Writ of Certiorari is respectfully sought to review the Court of Appeals decision, rendered without opinion, in this case which was placed on the summary calendar and decided without oral argument.

OPINIONS BELOW

The opinions of the District Court on a pretrial motion for summary judgment are unreported. They are set forth in Appendix A to this petition. No opinion

was rendered by the Court of Appeals; its order affirming the judgment of the District Court and its subsequent order denying a rehearing are likewise set forth in Appendix A.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, page 1a) was entered on September 2, 1971. A timely petition for rehearing was denied on September 15, 1971 (Appendix A, *infra*, page 19a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The sole issue presented for review is whether a seaman on a merchant vessel is precluded from instituting a suit against his employer under the Jones Act or against the vessel for unseaworthiness solely because at the time the accident occurred his employer, or the vessel, was performing services for the United States Government.

STATEMENT OF FACTS

On November 3, 1965, Henry Melancon entered into a contract of employment with a Joint Venture known as "RMK-BRJ." His job classification was that of "Assistant Dredge Superintendent" and he was assigned to the vessel JAMAICA BAY. The JAMAICA BAY was owned by Standard Dredging Corporation and operated by RMK-BRJ under a bare boat charter.

It is believed that the Joint Venture contracted with the Government of the United States to perform, among other things, services for the United States Navy in Southeast Asia by conducting certain dredging operations with the JAMAICA BAY. (*App.* at 112).

On January 7, 1967, an explosion occurred on the JAMAICA BAY and the vessel sank in navigable waters near My Tho, Republic of South Viet Nam. Henry Melancon lost his life in the sinking of the vessel. Subsequently, the widow of Henry Melancon instituted this suit against the Joint Venture and its individual corporate partners for damages under the Death on the High Seas Act and the Jones Act.

The Defendants have been represented throughout this litigation solely by Staff Attorneys of the United States Department of Justice. A multitude of procedural objections and delays, over a period of several years, have ultimately resulted in the outright dismissal of this case by the trial court. At no time has the Plaintiff had an opportunity to present evidence in support of her contention that the death of her husband would not have occurred absent negligence on the part of RMK-BRJ, or unseaworthiness of the vessel JAMAICA BAY.

It is most important that the following facts and distinctions be kept in mind:

(a) The vessel JAMAICA BAY was, at all times pertinent to this cause, owned and chartered by private American business entities — not by the Government of the United States;

(b) Henry Melancon was a seaman and a member of the crew of the vessel JAMAICA BAY — not a civil service employee of the United States;

(c) In order to recover damages on the merits, Plaintiff must prove that the death of her husband was caused, in whole or in part, by negligence of RMK-BRJ or by unseaworthiness of the vessel — not solely by fault of either the United States Government or hostile, belligerant action;

(d) At no time has this litigation sought damages against the Government of the United States.

An award for compensation was made by the Commissioner of Labor under the War Risk Hazards Act, 42 U.S.C. §1701-17. Armed with this award, the defendants moved for Summary Judgment, alleging that said act was Mrs. Melancon's exclusive remedy against the Defendants. Motion for Summary Judgment was granted in District Court and an appeal was lodged with the United States Court of Appeals for the Fifth Circuit. The case was placed on the summary calendar of that Court and decided, without oral argument, pursuant to Local Rule 18. The decision was rendered, without opinion, pursuant to Local Rule 21.

REASONS FOR GRANTING THE WRIT

A. The War Risk Hazards Act Does Not Contain Provisions of Exclusivity.

It is important to note at the outset of this argument that the War Risk Hazards Act, 42 U.S.C. §1701-17, under which the Plaintiff in this case has obtained an award, contains no provision whatsoever to the effect that said Act is the exclusive remedy of the person making a claim under the Act. The entire basis for the Motion for Summary Judgment of the Defendants is a reference to the Federal Employees' Compensation Act found in 42 U.S.C. §1701(a). By virtue of this reference to the FECA, the Defendants have contended that an exclusivity provision in the FECA was therefore incorporated by reference into the War Risk Hazards Act under which the Plaintiff recovered. The Act also makes reference, however, to the Longshoremen's and Harbor Workers' Compensation Act. (See 42 U.S.C. § 1702). Unlike the exclusivity provision in the FECA, the Longshoremen's and Harbor Workers' Compensation Act contains an exclusivity clause clearly pertaining to an "employer" of a claimant under that Act. In 1963, the United States Supreme Court made it quite clear that, notwithstanding this express language, the exclusivity provision did not apply to claims against an employer for "liability as a ship owner for the Yaka's unseaworthiness." *Reed v. Steamship Yaka*, 373 U.S. 410, 416 (1963). The rationale of the *Yaka* Case was as follows:

> "We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, 'All were subjected to the same danger. All were entitled to like treatment under law.' We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the Yaka's unseaworthiness in order to support his libel in rem against the vessel.
>
> "Reversed."
>
> 373 U.S. at 415-16.

The *Yaka* decision was expanded in the case of *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967), a case emanating from Louisiana Courts. In *Jackson*, the Supreme Court stated:

> "Yaka also stressed the fact that the traditional humanitarian remedy for unseaworthiness was not to be destroyed by the kind of employment contract that a shipowner made with the people who worked on the ship."
>
> *Id.* at 735.

Again, the Court Stated:

> "We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act."
>
> *Id.* at 735.

The effect of the decision of the trial court in this case, if affirmed, would be that a seaman employed on a merchant vessel would have to examine in detail the contracts of its employer in effect at the time of the accident to determine whether it had rights of unseaworthiness against the vessel or not. Nothing could be more "incongruous, absurd, and unjust."

The fact that a federal compensation act incorporates or makes reference to another similar act for the purposes of uniformity in administration does not indicate that Congress intended to impose all of the exceptions and limitations of one upon the other. For example, the Longshoremen's and Harbor Workers' Compensation Act specifically excludes from coverage a "master or member of a crew of any vessel." 33 U.S.C. §903. The Defense Bases Act incorporates by reference the provisions of the Longshoremen's and Harbor Workers' Act but specifically excludes from coverage "a master or member of a crew of any vessel." 42 U.S.C. §1654. The War Risk Hazards Act, on the other hand, also incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act but contains no such exclusion from coverage for

a master or member of a crew of a vessel. It would seem that had Congress intended for the incorporation by reference to carry with it the exclusion from coverage, it would not have deemed it necessary to restate the exclusion in the Defense Bases Act. Obviously, the United States Department of Labor, Bureau of Employees' Compensation, d o e s not interpret these acts to have pyramiding exclusions by virtue of the references to each other or it would not have rendered an award in this case for the death of a person who was unquestionably a seaman and member of a crew of a vessel.

An even more persuasive indication of Congressional intent, however, can be found in the following provision of the War Risk Hazards Act:

> "Where any person * * * after having obtained benefits under this subchapter, seeks through any proceeding, claim, or otherwise, brought or maintained against the *employer, the United States, or other person*, to recover wages, payments in lieu of wages, or any sum claimed as for services rendered, or for failure to furnish transportation, or for liquidated or unliquidated damages under the employment contract, or any other benefit, and the right in respect thereto is alleged to have accrued during or as to any period of time in respect of which payments under this subchapter in such case have been made, and in like cases where a recovery is made or allowed, the Secretary shall have the right of

> intervention and a lien and right of recovery to the extent of any payments paid and payable under this subchapter in such case, provided the cost of such wages, payments in lieu of wages, or other such right, may be directly or indirectly paid by the United States; and any amounts recovered under this subsection shall be covered into the fund established under section 35 of Act of September 7, 1916, as amended."
>
> 42 U.S.C. §1705(c) (emphasis added).

The foregoing provision specifically contemplates that a claimant under the War Risk Hazards Act may well prosecute claims arising from other causes of action against both the claimant's "employer" and "the United States," as well as third parties. In order to avoid double recovery against the United States, the provision provides that if as a result of any such claims additional benefits are paid either directly or indirectly by the United States Government, the Secretary has a right to intervene and set off the amounts paid under the War Risk Hazards Act. Presumably, therefore, if the United States Government should in some manner be required to pay a judgment rendered against the defendants in this case, directly or indirectly, it may well be that the Secretary could intervene in the case to recover benefits paid to the Plaintiff under the War Risk Hazards Act. On the other hand, had Congress intended, as the Defendants contend and the trial court held, for the War Risk Hazards Act to be the Plaintiff's exclusive remedy against either his employer or the United

States or both, the foregoing provision would have no meaning whatsoever.

B. The Exclusivity Provisions of the Federal Employees' Compensation Act are Inapplicable to the Case at Bar.

In the foregoing section, counsel has attempted to show that it was never intended by Congress to impose the exclusivity provisions of the Federal Employees' Compensation Act on the War Risk Hazards Act. For purposes of argument, however, it will be assumed in this section that such was the intent of Congress as the Defendants have argued and the trial court has held. A clear reading of the provision relied on, 5 U.S.C. §8116(c), reflects that this provision does not apply to the facts and circumstances of this case:

> "(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compen-

> sation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel."
>
> 5 U.S.C. §8116(c).

First, it should be noted that the provision applies only to claims against "the United States or an instrumentality thereof." Neither the original Petition of the Plaintiff, nor the First Supplemental and Amending Complaint, are directed against the United States or an instrumentality thereof. (*App.* at 1, 118). The Complaint for Damages is directed solely against private business interests with whom the deceased entered into an employment contract, individually and as charterers of the vessel JAMAICA BAY. Nor is there any evidence in the Record which would support a finding that these private corporations were, in fact, an "instrumentality" of the United States. Furthermore, absent fault on the part of these private business interests or unseaworthiness on the part of the JAMAICA BAY, the complaint cannot prevail in a trial on the merits. To hold that the charterers of the vessel were an "instrumentality" of the United States merely because they were performing a contract for the Government at the time of the accident would produce the "Incongruous, absurd, and unjust" results the United States Supreme Court has consistently attempted to avoid. See, *Reed v. Steamship Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967). Counsel is aware of no decision of the Courts of the United States to the effect that a seaman aboard a merchant vessel may

not institute claim against his employer under the Jones Act or against the vessel *in rem* for unseaworthiness if his employer at the time of the accident was performing a contract with the United States Government.

Second, it is most significant that the trial court decision, in quoting the exclusivity provision, completely omitted the last sentence of the Statute. (Appendix A, *infra*, page 13a). The sentence which was omitted states quite clearly: "However, this subsection does not apply to a master or a member of a crew of a vessel." 5 U.S.C. §8116(c). The footnote, which was quoted verbatim from the Defendants' Brief, explains that the last sentence was placed there by the Congress pending the United States Supreme Court decision of *Johansen v. United States*, 343 U.S. 427 (1952). It is true that the *Johansen* Case held that the Federal Employees' Compensation Act was the exclusive remedy of "civil service seamen." But there is nothing in the Record that Henry Melancon was a civil service seaman and if Plaintiff is ever allowed a trial on the merits the evidence will reflect that he was not. Furthermore, the United States Supreme Court in the *Johansen* Case clearly distinguished between civil service seamen on public vessels and merchant seamen on privately owned and chartered vessels:

> "Petitioner Johansen, in No. 401, and petitioner Mandel's decedent, in No. 414, were at the time of their injuries employed as civilian members of the crews of Army Trans-

> port vessels, *owned and operated by the United States. For purposes of this review* it *is clear that these vessels were at the time being used as 'public vessels,' not 'merchant vessels,'* * * * ."
>
> *Johansen v. United States*, 343 U.S. 427, 438-29 (1952); (emphasis added).

In making this distinction, the Court stated in footnote:

> "In reversing, the Court of Appeals held that (1) if the vessel was a 'public vessel,' petitioner's remedy under the Federal Employees Compensation Act precluded recovery in this action, but (2) if the vessel was a 'merchant vessel,' the case would present different questions, which need not be decided on this record. Accordingly, the case was remanded to the District Court to permit petitioner, if he so desires, to introduce evidence to show that the vessel was a 'merchant vessel.' This Court affirms that mandate."
>
> *Id.* at 429.

C. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to constitute a denial of procedural due process to Petitioner.

There exist in this case disputed issues of material fact, such as whether or not the deceased was a civil

service employee of the United States Government and whether or not the vessel upon which he died was a public vessel owned or operated by the United States Government. These unresolved questions of material fact notwithstanding, the trial court granted, without hearing oral arguments, summary judgment and the United States Court of Appeals for the Fifth Circuit summarily affirmed the decision of the District Court, again without oral argument. Petitioner has never been afforded her day in court and the summary treatment of her cause by the District Court and the Court of Appeals constitutes a violation of the Due Process clause of the Fifth Amendment.

> " ... '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 168, 95 L ed 817, 852, 71 S Ct 624 (1951) (concurring opinion). See also Homer v. Richmond, 292 F2d 719 (1961); Parker v. Lester, 227 F2d 708 (CA9th Cir. 1955)."
>
> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 901, 6 L ed 2d 1230, 81 S Ct 1743.

The right to an opportunity to be heard on questions of law and fact is an essential element of due process and a judgment rendered without opportunity to be heard is judicial oppression. *WJR, The Goodwill*

Station v. Federal Comm. Com'n., 174 F.2d 226, 233 (1948); *Londoner v. Denver*, 210 U.S. 373 (1908); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Morgan v. United States*, 304 U.S. 1 (1938); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

In *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (1966), The United States Court of Appeals for the Fourth Circuit reversed a summary judgment granted by the District Court stating:

> "These two appeals have a common issue; whether an employee injured aboard his employer's ship on navigable waters may, on the allegation that *he is a seaman*, sue his employer for damages upon the Jones Act or the general maritime law after deliberately obtaining compensation under Virginia's industrial statute or under the Longshoremen's and Harbor Workers' Act, on the allegation that *he is not a seaman*.
>
> "The District Court, on motions for summary judgment, dismissed the appellant-employees' separate actions at law ***. Decision was grounded on estoppel of the claimants to sue by reason of their prior pursuit and acceptance of compensation. The term 'compensation' is used herein as referring to the benefits provided by the State and Federal laws just mentioned.

> "We reverse. * * * moreover, summary judgment was inappropriate, we think, because the supporting papers did not exclude the existence of a genuine issue on the decisive fact of whether the plaintiffs were seamen, or acting as seamen, and so possessed of general maritime or Jones Act rights and remedies."
>
> *Id.* at 361-362. (emphasis supplied by the Court).

Additionally, the Court stated:

> "... we believe *Yaka* tolerates no distinction between the mere availability or voluntary payment of compensation and a positive claim for it.
>
> "... *Its tenet is clear that compensation statutes are not intended to deprive a seaman or his replacement of historic rights.*
>
> "We do not say that either plaintiff here is in actuality a Jones Act or *Sieracki* seaman. *We only say he should be heard to prove his real character.*"
>
> *Id.* at 364. (emphasis supplied).

Summary judgment procedure is intended to permit a party to pierce the allegations of fact and pleadings and obtain relief where the facts set forth in detail in affidavits, depositions and admissions on file reveal that there are no genuine issues of the facts to be tried.

(Fed. R. Civ. P. 56(b), 28 U.S.C.; *Crowley v. Matson Navigation Co.*, 434 F.2d 73 (5th Cir. 1970); *Cole v. Chevron Chem. Co.*, 427 F.2d 390 (5th Cir. 1970). The issues in the instant case should have been determined from all of the evidence in the case (*Virginia Natl. Bk. v. Central Gulf S.S. Corp.*, 319 F.Supp. 1323 (1970) and yet Petitioner has had no opportunity to present evidence concerning material issues of fact. She has not had her day in court and, it is respectfully submitted, that the summary treatment accorded Petitioner constitutes a denial of due process and requires a reversal of the Summary Judgment granted herein.

CONCLUSION

It is indeed a strange interpretation of the law to conclude that Congress intended to impose a harsh exclusivity provision on the War Risk Hazards Act by a vague reference to the Federal Employees' Compensation Act. The fact that the War Risk Hazards Act itself contains no such exclusivity provisions coupled with a very clear provision concerning intervention by the Secretary of Labor in the event that a claimant should also bring suit against his employer or the United States Government or a third party clearly indicates that Congress intended just the opposite. But the error of the trial court is compounded by the fact that the provision relied on merely excludes claims against the United States and instrumentalities of the United States and no such claim has ever been urged in these proceedings. Finally, the provision relied on contains an express statement that it "does not apply to a master or a member of a crew of a vessel" and the de-

ceased, Henry Melancon, falls squarely in this category. The two-fold requirement of the *Johansen* line of cases extending the exclusion to "civil service seamen" serving on "public vessels owned or operated by the United States" has not and cannot be established by competent evidence in this case.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The effect of this decision deprives thousands of merchant seamen of their right to bring an action for damages under the Jones Act against their employers.

There exist disputed material issues of fact concerning the status of Henry Melancon. Notwithstanding this, the trial court granted summary judgment and Plaintiff was treated summarily upon appeal. The procedural treatment accorded Petitioner by the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and the Court of Appeals has so far sanctioned such a departure by a lower court, as to deny Petitioner procedural due process of law and to call for an exercise of this Court's power of supervision.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for A Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit has been served on counsel for Respondent by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

Mr. Alan S. Rosenthal
and

Mrs. Patricia S. Baptiste
Appellate Section, Civil Division
Room 3706
U. S. Department of Justice
Washington, D.C. 20530

LAKE CHARLES, LOUISIANA: November ____, 1971.

THOMAS M. BERGSTEDT

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 12,995

MRS. DELTA MELANCON

versus

MORRISON-KNUDSEN INTERNATIONAL COMPANY, INC.; RAYMOND INTERNATIONAL OF DELAWARE, INC.; BROWN & ROOT, INC.;
and
J. A. JONES CONSTRUCTION COMPANY

FOR PLAINTIFF
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William E. Gwatkin, III
Admiralty and Shipping Section

United States Department of Justice
Washington, D. C.

HUNTER, JUDGE:

This action arises out of the death of Henry Melancon, who according to the record lost his life when bombs placed by the Viet Cong exploded and sank the Dredge JAMAICA BAY, on which he was employed, on or about January 9, 1967. Melancon was an employee of a joint venture called RMK-BRJ, a Navy cost-plus contractor, which in its capacity as a joint venture, was the bareboat charterer and operator of the JAMAICA BAY at the time of Melancon's death.

Plaintiff brings suit to recover for the death of Henry Melancon, her husband, naming RMK-BRJ in its capacity as a joint venture and separate juristic entity as the only defendant in the caption of her complaint, but in the body of the complaint naming as defendants and demanding collective judgment against only the four corporate members of the joint venture and not the joint venture itself. In prior proceedings, we here ruled that there was no suit pending against the joint venture, from which no judgment had been demanded, against which no process had issued, and which had never been served.[1] The Court also dismissed the cause against two of the four member corporations

---

[1]Our Memorandum Ruling on jurisdictional matters, entered on March 13, 1969, is attached (Exhibit 1).

for insufficiency of service of process and lack of jurisdiction over the person.[2]

Following the ruling on jurisdictional matters, this suit was stayed pending a determination by the Bureau of Employee's Compensation of the Department of Labor whether plaintiff had a compensation remedy under the Defense Base Act, 42 U.S.C.A. §§ 1651-1654, or the War Risk Hazards Act, 42 U.S.C.A. §§ 1701-1717, or either of them, the plaintiff having made a claim for compensation benefits, and the defendants claiming that the compensation remedy was exclusive so as to bar and preclude this action.[3] On December 4, 1969, the Director of the Bureau of Employee's Compensation made a compensation order awarding death benefits to the plaintiff under War Risk Hazards Compensation Act. Following entry of the compensation order, on plaintiff's motion of August 11, 1970, we vacated the stay order and the case was restored to the active calendar. It is now pending upon motion of the defendants for summary judgment.

THE LEGAL ISSUES

1. Whether this suit may be maintained against two of the four members of the joint venture where all

---

[2]The two defendant member corporations as to which the case was dismissed were Raymond International of Delaware, Inc., and Morrison Knudsen International Company, Inc. The remaining defendants are: (1) Brown & Root, Inc., and (2) J. A. Jones Construction Company, both of whom are nonresident corporations licensed to do business and doing business unrelated to the joint venture in Louisiana.

[3]The stay order, entered on June 9, 1969, is attached. (Exhibit 2).

of the members are not subject to service of process and the joint venture has not been made a party to the litigation.

2. Whether the War Risk Hazards Compensation Act, under which plaintiff has claimed and been awarded compensation benefits, provides her with an exclusive remedy so as to preclude her from maintaining this action against her husband's employer to recover damages for his death, which occurred when bombs placed by the Viet Cong exploded and sank the dredge on which has was employed during the war in Viet Nam.

In its present posture, the case is pending against two corporate members of the joint venture. By motion for summary judgment, these two defendants contend that, standing alone, merely in their capacity as members of the joint venture, they may not be sued on a joint venture obligation and are not themselves obligated to the plaintiff on the cause of action she asserts.

Resolution of questions concerning capacity to sue or to be sued are by the Federal Rules of Civil Procedure left for the most part to state law. After discussing the capacity of individuals and corporations, Rules 17(b) of the Federal Rules of Civil Procedure provides that:

> In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1)

> that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States
> * * *

In order to determine whether the members of a joint venture may themselves be sued on an obligation of the joint venture, we examine Louisiana law.

In Louisiana, joint ventures are governed generally by the same rules as are partnerships. *Frazell v. United States*, 213 F. Supp. 457, 462 (W.D. La. 1963), reversed on other grounds 335 F. 2d 487 (5th Cir. 1964), cert. denied 380 U.S. 961 (1965); *Ault & Wiborg Co. v. Carson Carbon Co.*, 181 La. 681, 688, 160 So. 298, 300 (1935); *Ludeau v. Avoyelles Cotton Co.*, 164 La. 275. 113 So. 846 (1927); *Duncan v. Gill*, 227 So. 2d 376, 381-383 (La. App. 1969), writ denied 255 La. 338-341, 230 So. 2d 834-835 (1970), cert. denied 397 U.S. 1074 (1970). Turning then to the Louisiana law of partnership, we find under Article 737 of the Louisiana Code of Civil Procedure that a partnership has the procedural capacity to be sued under its partnership name, but that (Art. 737):

> The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

The Article is declaratory of the rule of law established by Louisiana jurisprudence, that liability upon the obligations of a Louisiana partnership does not become enforceable against the members thereof, separate and apart from the partnership itself, until the partnership has dissolved. E. B. Hayes Machinery Co. v. Eastham, 147 La. 347, 352-354, 84 So. 898, 899-900 (1920); Key v. Box, 14 La. Ann 497 (1857); Moore v. Easom, 46 So. 2d 162 (La. App. 1950).[4] In Louisiana, therefore, a judgment cannot be obtained against a member of a partnership upon a partnership obligation, while the partnership exists, except by also obtaining a judgment against the partnership itself. Snyder v. Davison, 172 La. 274, 278, 134 So. 89, 91 (1931); Harrison v. Frye, 46 So. 2d 382 (La. App. 1950).

As observed in our earlier ruling on jurisdictional matters, the joint venture has not been made a party to this suit, no process has been issued against it, no prayer for relief has been made against it, and the suit against it simply does not exist. Since the joint venture as such is not a party defendant, the suit cannot be maintained against the two corporate members who still remain as defendant parties in the case.[5]

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[4]RMK-BRJ is an existing joint venture, engaged in various construction projects for the Navy in Southeast Asia at the present time, with its principal place of business in the United States at San Bruon, California. (Exh. D).

[5]Without the joint venture as a party defendant, the suit ought not to go forward in any event. To the extent that plaintiff claims a substantive right under the Jones Act, 46 U.S.C.A. § 688, she can bring suit only against her decedent's employer,

Kline v. Dawson, 230 La. 901, 911, 89 So. 2d 385, 389 (1956). The action against Brown & Root, Inc., and J. A. Jones Construction Company, the two remaining corporate defendants, must therefore be dismissed. However, plaintiff now wishes to file supplemental pleadings seeking relief against RMK-BRJ and argue that service on one member of the joint venture constitutes valid service on it (the office and principal place of business of which is located in San Bruno, California). This would present another contested procedural issue which need not be faced today, because we feel the motion for summary judgment must be granted because plaintiff's exclusive remedy against her husband's employer for his death is provided by the War Risk Hazards Compensation Act.

At about the same time she commenced this action alleging that decedent had been "a member of the crew" of the Dredge JAMAICA BAY (Complaint, Art. V), plaintiff also filed a claim for compensation benefits with the Bureau of Employees' Compensation of the Department of Labor. This claim was contemplated by her decedent's employment contract, pur-

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Williamson v. Darpit Bros. Marine Divers, Inc., 337 F. 2d 337, 339 (5th Cir., 1946), but her decedent was not employed by the two remaining defendants or either of them. The employer and the bareboat charterer and operator of the Dredge JAMAICA BAY was the joint venture itself, which in its capacity, as such may have defenses of set-off for payments made under a $50,000 war risk life insurance policy carried for its employees, and limitation of liability under the Shipowners' Limitation of Liability Act, 46 U.S.C.A. §§ 183-189.

suant to which he was employed as an assistant superintendent by RMK-BRJ, the joint venture, which provided that compensation insurance benefits for injuries or illnesses arising out of the course of the employment were generally to be paid in accordance with the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Base Act, 42 U.S.C.A. §§ 1651-1654.

As to war risks, however, the employment contract made a distinction and expressly provided that, (Clause 9(b)):

> For injuries, disabilities, detention, death, or other losses arising out of or in connection with war, rebellion, and strife, or the acts of civil authority or of the armed forces of any government, the Employee's remedy shall be such, if any, as is provided in the War Risk Hazards Act (42 U.S.C. 1701-1717) or other statutes in amendment to or in substitution therefor; but the Contractor [RMK-BRJ] shall have no responsibility or liability to the Employee or his successors upon any claim from these causes. (Matter in brackets supplied).

The employer's reports disclosed that plaintiff's decedent had lost his life "when bombs placed by the Viet Cong exploded, sinking the dredge" on which he had been employed and his death clearly came within the war risk rather than the ordinary compensation category. In subsequent amplication of her compensation claim, plaintiff through her counsel accordingly

made specific reference to the provision of her decedent's employment contract which called for application of the War Risk Hazards Compensation Act, stressed the report that her husband had been killed when the Viet Cong blew up the JAMAICA BAY, furnished some further documentation to establish that her decedent's death had been caused by a war risk hazard, emphasized that her claim was being made under the War Risk Hazards Compensation Act and not under the Defense Base Act, and contended that the War Risk Hazards Compensation Act did not contain any provision excluding the member of a crew of a vessel from compensation benefits thereunder. (See Exhibits A through F(4) attached).

Following entry of the stay order by this Court for an administrative determination of plaintiff's rights to compensation benefits, the Director of the Bureau of Employees' Compensation upon consideration of the contentions made on plaintiff's behalf and the evidence on file entered a compensation order awarding death benefits to the plaintiff under the War Risk Hazards Compensation Act (Exh. F(5)).[6] The decision of the Director, to whom the final authority in the approval of war risk hazard compensation claims has been delegated (42 U.S.C.A. § 1706; 20 CFR § 01.41;

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[6]Hearings are not authorized by the War Risk Hazards Compensation Act, and the adjudication of cases is upon written evidence as in cases under the Federal Employees' Compensation Act, 20 CFR # 01.41. There are provisions for administrative review upon application of a claimant adversely affected by a final decision of the Director (5 U.S.C.A. §§ 8124, 8128, 8149; 20 CFR §§ 501.1(a), 501.3(a)), but such provisions do not apply here where the Director's decision was in the claimant's favor.

24 F.R.D. 8472, Oct. 20, 1959), is by the statute made "final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise." 42 U.S.C.A. § 1715. It is thus conclusively settled for this Court that plaintiff is entitled to compensation benefits under the War Risk Hazards Compensation Act.

The key question concerning the compensation issue is whether the War Risk Hazards Compensation Act provides plaintiff with an exclusive remedy so as to preclude this action. A study of the statute and the controlling decisions persuades us that plaintiff's compensation remedy is indeed exclusive, and we are required to grant the motion for summary judgment.

The War Risk Hazards Compensation Act, 42 U.S.C.A. §§ 1701-1717, with certain exceptions provides for payment of compensation benefits with government moneys out of the Federal Employees' Compensation Fund (see 5 U.S.C.A. § 8147; 42 U.S.C.A. §1701(a)(b) in cases of injury or death of employees of government contractors resulting from a war risk hazard. 42 U.S.C.A. § 1701(a). Except for the scale of compensation benefits, which is that contained in the Longshoremen's and Harbor Workers' Compensation Act, 42 U.S.C.A. § 1702, the War Risk Hazards Compensation Act makes the provisions of the Federal Employees' Compensation Act, 5 U.S.C.A. §§ 8101-8150, applicable to war risk deaths or injuries sus-

tained by a contractor's employee.[7] Where an injury or death to a contractor's employee proximately results from a war risk hazard, and whether or not the employee was then actually engaged in the course of his employment, the act expressly provides that (42 U.S.C.A. §1701(a)):

> * * * the provisions of the [Federal Employees' Compensation Act] shall apply with respect thereto in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty * * * (Matter in brackets supplied).

Accordingly, once a determination has been made that the contractor's employee or beneficiary is entitled to War Risk Hazard Compensation benefits, as here, then the provisions of the Federal Employees' Compensation Act become applicable, and the claimant's rights and limitations become the same as though her decedent had been a government civil service employee. To put it another way, if plaintiff's decedent was a

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[7]The term "war risk hazard" is expressly defined by the statute, 42 U.S.C.A. § 1711(b), so as to include an armed conflict in which the United States is engaged, whether or not war has been declared, and an armed conflict between military forces of any origin within a country in which a contractor's employee is serving. It means a hazard arising from the use of any weapon or explosive by a hostile force or person, 42 U.S.C.A. § 1711(b)(1), or from the action of a hostile force or persons, 42 U.S.C.A. § 1711(b)(2), as well as from "the operation of vessels * * * in a zone of hostilities. * * *" 42 U.S.C.A. § 1711(b)(5).

member of the crew of a vessel, then plaintiff's rights as against her decedent's employer are no greater than if decedent had been a federal civil service seaman. What this means in the context of the instant case is illustrated by *Mandel v. United States*, 191 F. 2d 164 (3rd Cir. 1951), affirmed sub nom. *Johansen v. United States*, 343 U.S. 427 (1952), which arose out of the death of a civil service crew member of an Army tug who lost his life when the tug hit a mine and was destroyed while entering a port in Sardinia. The Court of Appeals held that his administrator could not maintain an action for the damages caused by his death, because the Federal Employees' Compensation Act was the exclusive measure of the rights of a civil service seaman. Judge Goodrich aptly stated (191 F. 2d, at 166):[8]

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[8]During the pendency of the *Mandel* litigation, the Federal Employees' Compensation Act was amended, 63 Stat. 854 (1949), so as among other things expressly to contain the exclusivity provision that is now found at 5 U.S.C.A. § 8116(c):

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

The legislative history of the reference contained in the following sentence to a master or member of a crew of a vessel, 63 Stat. 854, 861-862, 868 (1949), discloses that it was intended only to reserve the question of the rights of civil service seamen pending Supreme Court resolution of a conflict among the circuits, which was subsequently settled in favor of the exclusivity of the compensation remedy by *Johansen v. United*

> It is the general rule that unless the [workmen's compensation] act is by its terms optional, *remedies provided by the act are exclusive* when the act is applicable, at least *so far as rights against the employer are concerned.* (Emphasis and matter in brackets supplied)

The Supreme Court affirmed in *Johansen v. United States*, 343 U.S. 427 (1952), resolving a prior conflict among the circuits and conclusively establishing that the Federal Employees' Compensation Act provided the exclusive remedy against the United States as the employer for the death or injury of federal civilian seamen entitled to its compensation benefits.

Since *Johansen* it has been the settled law of this circuit and elsewhere that federal civil service seamen who have a compensation remedy are precluded from bringing suit against their employer. *Patterson v. United States*, 359 U.S. 495 (1959); *Johnson v. United States*, 402 F. 2d 778 (5th Cir. 1968); cert. denied 394 U.S. 930 (1969); *Aho v. United States*, 374 F. 2d 885 (5th Cir. 1967), cert. denied 389 U.S. 930 (1967); *Jarvis v. United States*, 342 F. 2d 799 (5th Cir., 1965), affirming per curiam *Petition of United States*, 212 F. Supp. 214 (E.D. La. 1962), cert. denied 382 U.S. 832 (1965); *Mills v. Panama Canal Co.*, 272 F. 2d 37 (2nd Cir. 1959),

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***States*, 343 U.S. 427, 435-438 (1952), and remains settled today. See *Amell v. United States*, 384 U.S. 158, 160-171 (1966); *Johnson v. United States*, 402 F. 2d 778 (5th Cir. 1968), cert. denied 394 U.S. 930 (1969); *Aho v. United States*, 374 F. 2d 885 (5th Cir. 1967), cert. denied 389 U.S. 930 (1967).**

cert. denied 362 U.S. 951 (1960). The same result necessarily follows in this case, where the Federal Employees' Compensation Act with its principle of exclusivity is made applicable to those entitled to a war risk hazards compensation remedy, and where even if it were not, the general rule that a compensation remedy is exclusive and precludes an action against the employer would require dismissal of this action. *United States v. Demko*, 385 U.S. 149 (1966); *Feres v. United States*, 340 U.S. 135 (1950); *Lowe v. United States*, 292 F. 2d 501 (5th Cir. 1961), affirming per curiam 185 F. Supp. 189 (N.D. Miss. 1960); *Aubrey v. United States*, 254 F. 2d 768 (D. C. Cir. 1958); *Mandel v. United States*, 191 F. 2d 164 (3rd Cir. 1951), affirmed sub nom. *Johansen v. United States*, 343 U.S. 427 (1952).[9]

We conclude that plaintiff has a remedy and is receiving compensation benefits under the War Risk Hazards Compensation Act, 42 U.S.C.A §§ 1701-1717. As a result, her rights are measured by the Federal Employees' Compensation Act, 5 U.S.C.A. §§ 8101-8150, which the War Risk Hazards Compensation Act incorporates by reference, 42 U.S.C.A § 1701(a). Under that statute, as well as according to general principles of law, a person is precluded from maintaining an action

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[9]Another reason given by Judge Goodrich for holding in *Mandel* that compensation should be the exclusive remedy was that it was not in the public interest to have judicial review of the question of negligence in the conduct of military or semi-military operations, and that the production of evidence necessary to defend the case was not desirable from the standpoint of national defense. *Mandel v. United States*, 191 F. 2d 164, 167-168 (3rd Cir. 1951), aff'd on other grounds sub nom. *Johansen v. United States*, 343 U.S. 427 (1952). Those reasons seem to be singularly valid in this war risk case of a death from enemy action where a jury trial has been demanded.

against his employer to recover damages for a death or injury for which an administrative compensation remedy has been provided. The War Risk Hazards Compensation Act accordingly provides Mrs. Melancon with her exclusive remedy against her decedent's employer in the premises, and compels entry of judgment dismissing this action.[10] For these reasons, defendants' motion for summary judgment should be granted, and the Court should enter summary judgment dismissing plaintiff's action with prejudice and costs. It is so ORDERED.

THIS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this the 9th day of February, 1971.

(Signed) EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT JUDGE

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[10]According to the Government's brief, she has also received the benefits of a $50,000 War Risk Life Insurance policy carried by the joint venture.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MRS. DELTA MELANCON

vs. CIVIL ACTION No. 12,995

RMK-BRJ, A Joint Venture, et al

ORDER

A decision was handed down on the 9th day of February, 1971. On February 12, 1971, I signed an Order permitting an amendment permitting the joinder of RMK-BRJ, A Joint Venture, as an additional Party-Defendant. Having permitted this amendment, the Court decides that it does have jurisdiction over this proceeding. The Court ruling of February 9th sustaining Defendant's Motion for Summary Judgment is reaffirmed on the basis that the War Risk Hazard Act is the exclusive remedy of the Plaintiff.

This is a final judgment and Plaintiff's suit is hereby dismissed.

THUS DONE AND SIGNED in Chambers in Lake Charles, Louisiana on this 15th day of February, 1971.

/s/ EDWIN F. HUNTER, JR.
United States District Judge

TMB/vnm
2/13/71

IN THE
UNITED STATES COURT of APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1560
Summary Calendar*

MRS. DELTA MELANCON,
Plaintiff-Appellant,
versus

RMK-BRJ, A Joint Venture, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(September 2, 1971)

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: Affirmed.[1] See Local Rule 21.**

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]The decision of the lower court is reported as *Melancon v. RMK-BRJ, a joint venture, et al.*, W.D. La. 1971, ____ F.Supp. ____.

**See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

UNITED STATES COURT of APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1560
Summary Calendar

D. C. Docket No. CA 12995

MRS. DELTA MELANCON,
Plaintiff-Appellant,

versus

RMK-BRJ, A Joint Venture, ET AL.,
Defendants-Appellees,

Appeal from the United States District Court for the Western District of Louisiana

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 2, 1971

Issued As Mandate:

IN THE
UNITED STATES COURT of APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1560
Summary Calendar*

MRS. DELTA MELANCON,
Plaintiff-Appellant,

versus

RMK-BRJ, A Joint Venture, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(September 15, 1971)

ON PETITION FOR REHEARING

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-613

MRS. DELTA MELANCON, PETITIONER

v.

RMK-BRJ, A JOINT VENTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. This action was instituted in the district court by petitioner under the Jones Act, 46 U.S.C. 541 *et seq.*, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*, to recover damages for the wrongful death of her husband, who was drowned in South Vietnam when bombs placed by the Viet Cong exploded, sinking the dredge on which he was employed by respondent, a contractor of the United States.

The district court granted respondent's motion for summary judgment (Pet. App. 1a–15a) on the ground that petitioner's exclusive remedy lay under the War Risk Hazards Compensation Act, 42 U.S.C. 1701 *et*

452-818—71

seq.[1] That Act authorizes compensation payments for a war-risk death or injury to a government-contractor's employee, and makes the provisions of the Federal Employees' Compensation Act, 5 U.S.C. 8101–8150, applicable to such death or injury "in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty * * *." 42 U.S.C. 1701(a).[2] The court of appeals affirmed *per curiam* (Pet. App. 17a) and denied a petition for rehearing (Pet. App. 19c–20a).

2. In cases arising under the Federal Employees' Compensation Act, this Court and the courts of appeals have uniformly held that federal civil service seamen who have a compensation remedy are precluded from bringing a tort action against their employer—whether based upon negligence or unseaworthiness. *Johansen* v. *United States*, 343 U.S. 427; *Patterson* v. *United States*, 359 U.S. 495; *Johnson* v. *United States*, 402 F. 2d 778 (C.A. 5), certiorari denied, 394 U.S. 930; *Aho* v. *United States*, 374 F. 2d

[1] The suit had previously been stayed by the district court pending a determination by the Bureau of Employees' Compensation of the Department of Labor as to whether petitioner had a compensation remedy under the Defense Base Act, 42 U.S.C. 1651–1654, or the War Risk Hazards Act, 42 U.S.C. 1701–1717 (Pet. App. 3a). On December 4, 1969, the Director of the Bureau entered a compensation order awarding petitioner death benefits under the War Risk Hazards Compensation Act.

[2] The scale of compensation benefits to be paid under the War Risk Hazards Compensation Act is that contained in the Longshoremen's and Harbor Workers' Compensation Act, 42 U.S.C. 1702.

885 (C.A. 5), certiorari denied, 389 U.S. 930; *Suhar* v. *United States*, 351 F. 2d 952 C.A. 5); *Jarvis* v. *United States*, 342 F. 2d 799 (C.A. 5), affirming *Petition of the United States*, 212 F. Supp. 214 (E.D. La.), certiorari denied, 382 U.S. 831; *Mills* v. *Panama Canal Co.*, 272 F. 2d 37 (C.A. 2), certiorari denied, 362 U.S. 961. The same result necessarily follows in this case where the Federal Employees' Compensation Act, including its specific exclusivity provision (5 U.S.C. 8116(c)), is made applicable by statute to those entitled to a War Risk Hazards Compensation Act remedy.[3]

Petitioner notes (Pet. 7, 8) that Section 102(a) of the War Risk Hazards Compensation Act, 42 U.S.C. 1702(a), includes a reference to the Longshoremen's and Harbor Workers' Compensation Act, which in turn excludes from coverage the masters or members of the crew of a vessel. What she overlooks, however, is that 42 U.S.C. 1702(a) limits the application of the Longshoremen's Act to the War Risk Hazards Compensation Act by applying the former only to determine "the scale of compensation benefits and the provisions for determining the amount of compensation and the payment thereof * * * *". By contrast, the provisions of the Federal Employees' Compensation Act were

[3] Petitioner's reliance (Pet. 5–7) upon *Reed* v. *The Yaka*, 373 U.S. 410, and *Jackson* v. *Lykes Bros. SS. Co.*, 386 U.S. 731, is misplaced. As recognized in *Aho* v. *United States*, 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930, these decisions do not affect the application of the exclusivity provision of the Federal Employees' Compensation Act.

intended to apply to entitlement to benefits "in the same manner and to the same extent" (42 U.S.C. 1701(a)) as they apply to civil employees of the United States.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971